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No. 85-1772

In the Supreme Court of the United States

October Term 1986

THE STATE OF UTAH, by and through its DIVISION OF STATE LANDS,
Petitioner,

v.

UNITED STATES OF AMERICA; DONALD P. HODEL, Secretary of the Interior; ROBERT F. BURFORD, Director of the Bureau of Land Management within the Department of the Interior; and ROLAND G. ROBISON, JR., Utah State Director of the Bureau of Land Management,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

DAVID L. WILKINSON
Utah Attorney General
DALLIN W. JENSEN
Solicitor General
Counsel of Record
MICHAEL M. QUEALY
Assistant Attorney General
R. DOUGLAS CREDILLE
Assistant Attorney General
1636 West North Temple, Suite 300
SALT LAKE CITY, UT 84116
(801) 533-4446
ATTORNEYS FOR PETITIONER

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QUESTIONS PRESENTED

Utah Lake is a navigable body of water whose bed Utah claims under the Equal Footing Doctrine. The United States claims the lakebed because the United States Geological Survey made a pre-statehood withdrawal of the Lake as a reservoir site. The purported authority for the withdrawal was the Sundry Appropriations Act of 1888, which did not specify the reservoir sites to be withdrawn and did not refer to sovereign lands.

The questions presented are:

1. Whether the provisions of the 1888 Act defeat Utah's entitlement to the bed of Utah Lake under the Equal Footing Doctrine.

2. Whether the administrative withdrawal was statutorily authorized and, if so, whether the withdrawal is sufficient to defeat Utah's sovereign ownership.

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The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 780 F.2d 1515 (Pet. App. 1a-27a). The opinion of the United States District Court for the Central Division of Utah (Jenkins, D.J.) is reported at 624 F.Supp. 622 (Pet. App. 28a-41a).

JURISDICTION

The Tenth Circuit on December 26, 1985, entered a judgment and an opinion affirming the District Court's summary judgment quieting title to the bed of Utah Lake in the United States (J.A. 41; Pet. App. 27a). No petition for rehearing was sought. On March 12, 1986, Justice White ordered that the time for filing the petition for writ of certiorari be extended to and including April 25, 1986. The certiorari petition was timely filed, and was granted October 14, 1986 (J.A. 43). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Sundry Appropriations Act of Oct. 2, 1888, ch. 1069, 25 Stat. 505, 526-27, states in relevant part:

> For the purpose of investigating the extent to which the arid region of the United States can be redeemed by irrigation, and the segregation of the irrigable lands in such arid region, and for the selection of sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and the prevention of floods and overflows, and to make the necessary maps, including the pay of employees in field and in office, the cost of all instruments, apparatus, and materials, and all other necessary expenses connected therewith, the work to be performed by the Geological Survey, under the direction of the Secretary of the Interior, [there is appropriated] the sum of one hundred thousand dollars or so much thereof as may be necessary. * * * And all the lands which may hereafter be designated or selected by such United States surveys for sites for reservoirs, ditches or canals for irrigation purposes and all the lands made susceptible of irrigation by

> such reservoirs, ditches or canals are from this time henceforth hereby reserved from sale as the property of the United States, and shall not be subject after the passage of this act, to entry, settlement, or occupation until further provided by law:
>
> *Provided*, That the President may at any time in his discretion by proclamation open any portion or all of the lands reserved by this provision to settlement under the homestead laws.

STATEMENT

This case determines whether Utah or the United States owns the bed of Utah Lake, the State's largest freshwater, navigable lake.[1] Utah has relied on the Equal Footing Doctrine for title to this 150-square-mile natural resource since its statehood date, January 4, 1896. Since that date, Utah has exercised its ownership of the Lake through use, management, control[2] and judicial declaration.[3]

In 1976 the Bureau of Land Management issued oil and gas leases on the lakebed. That, in Utah's view, violated the State's sovereign title. After negotiations failed to resolve the dispute, Utah filed this action in the district court. The State sought quiet title and declaratory relief, as well as confirmation of title under the Submerged Lands Act, 43 U.S.C. 1311. Jurisdiction was

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[1] "[T]here is no dispute that Utah Lake is a navigable body of water." (Pet. App. 8a). See also Pre-Trial Order (J.A. 12-13).

[2] R. Vol. IV, Tabs A-K.

[3] State v. Rolio, 71 Utah 91, 262 Pac. 987 (1927); and Provo City v. Jacobsen, 111 Utah 39, 176 P.2d 130 (1947), **on rhg.**, 111 Utah 68, 181 P.2d 213 (1947), **and on second appeal after remand,** 117 Utah 507, 217 P.2d 577 (1950). These cases, however, did not have the United States as a party and did not address the issues presented here.

under 28 U.S.C. Sections 1331, 2201, and 2409a (J.A. 4 & 10). Following discovery and a pre-trial hearing, the dispute was submitted to the district court on cross-motions for summary judgment (J.A. 18 & 39). The United States prevailed (Pet. App. 41a). Utah appealed (J.A. 40), and the Tenth Circuit affirmed (Pet. App. 1a). Utah then sought a writ of certiorari, which this Court granted October 14, 1986 (J.A. 43).

The United States' claim to the lakebed depends on a purported withdrawal of Utah Lake by the United States Geological Survey ("USGS"). USGS made the withdrawal in 1889, asserting authority under the Sundry Appropriations Act of 1888, 25 Stat. 505, 526-27 (quoted in relevant part *ante* at 2-3), which authorized USGS to select "sites for reservoirs, ditches or canals for irrigation purposes and all the lands made susceptible of irrigation by such reservoirs, ditches or canals," in "the arid region of the United States." Lands selected were, by the Act's terms, reserved from sale as the property of the United States, and were no longer open to entry, settlement, or occupation; however, a proviso gave the President discretion to "open any portion or all of the lands reserved by this provision to settlement under the homestead laws." 25 Stat. 527. Nothing in the Act referred to sovereign lands (*i.e.*, beds of navigable waters), and there was no mention of Utah Lake.

Congress passed the Act to counter a particular problem on the public domain.[4] Land speculators, commonly called "land-grabbers," were using public-land laws to preempt, exploit and monopolize public lands. The problem was widespread, and Congress was especially concerned that monopolists would gain ownership or control of public lands that were most easily irrigated or suitable as reservoir sites. For by monopolizing these most useful lands, the speculators (individuals, syndicates and corporations) could control the benefits of water. And that would jeopardize future settlement.

[4] The 1888 Act's legislative history clearly shows the problem and Congress's intentions in solving the problem. The problem is more fully discussed, with citations, in part I.B.2.b. of the Argument.

To remedy the problem, Congress passed the 1888 Act to preclude entrymen from those particular public lands. It authorized USGS to survey the "arid region of the United States" to determine which public lands could be redeemed by irrigation and which were suitable reservoir sites. And it authorized USGS to select suitable reservoir, ditch and canal sites and the lands that could be irrigated from those improvements. Their selection withdrew or reserved those sites from entry under the land laws, keeping them safe from monopolists and preserving them for more orderly disposition. The Act had the effect of suspending operation of the land laws on the selected lands.

USGS used its authority under the Act to withdraw large areas of the public domain. Unfortunately, in the case of Utah Lake at least, USGS also assumed authority to withdraw sovereign lands; in 1889 it withdrew Utah Lake as a reservoir site. And although it has never used the Lake as a reservoir site, the United States now claims the lakebed because of the withdrawal.

The Tenth Circuit held (1) that the 1888 Act authorized the withdrawal of sovereign lands, and that in 1889 USGS withdrew the lakebed and thereby defeated Utah's Equal Footing title; and (2) that the Submerged Lands Act did not confirm Utah's title.

A principal reason the lower court gave for its decision was the 1888 Act's silence about sovereign lands. The court found authority for the Utah Lake withdrawal by interpreting the Act as "impos[ing] no restriction * * * on the type of lands that could be designated or selected." (Pet. App. 15a.) Using that rationale, the court concluded Utah could not have title because the "terms of the Act excluded [no] beds of navigable waters" from USGS selection. *Id.* The court also found the Act's facilitation of irrigation was "a public purpose motivated by a public exigency," which it held was enough to defeat sovereign title under the "public exigency" test (Pet. App. 23a). The fact that settlers could irrigate from the Lake was, in the court's view, reason to deny Utah's title in the lakebed. *Id.*

SUMMARY OF ARGUMENT

Utah asserts title to the bed of Utah Lake under the Equal Footing Doctrine. For over 140 years the Doctrine has assured that each State owns the lands beneath navigable waters (sovereign lands) within its jurisdiction. The Doctrine strictly protects State title. The Doctrine's lone exception is for pre-statehood title conveyances, *Montana v. United States*, 450 U.S. 544, 551-52 (1981), but it is very narrow and difficult to prove, and has applied only once, under unusual circumstances and specific language of conveyance. *Id.* at 555 n. 5. The narrow exception applies only after its proponent's case passes several stringent tests designed to insure that State title is not easily defeated.

The exception requires that Congress have conveyed the sovereign land to meet a public exigency. And such intention may not be lightly inferred. Indeed, there is a "strong presumption" against any such conveyance. *Id.* at 552, 554. Title passes to the State unless Congress has very clearly and definitely expressed its intention to convey, *id.* at 552, 554-55; a relevant public exigency is evident, *id.* at 552, 556; and the United States' proof overcomes the "strong presumption." In this case the United States cannot defeat the State's Constitutional entitlement.

The United States alleges no conveyance of lakebed title to any third party, but relies merely on the pre-statehood withdrawal or reservation itself. But the Constitution will not permit a State's sovereign title to be defeated except by a pre-statehood title conveyance from the United States to some third party for a public exigency. If the United States' title was not extinguished in that manner before statehood, the new State takes title as an incident of statehood. That is the Equal Footing Doctrine.

Under existing law, the United States cannot prevail. So, what the United States really seeks is a new exception that would disregard the conveyance requirement and give primacy to withdrawals and reservations

over a State's Constitutional entitlement. Nothing justifies such a change in Constitutional law. And there are also other reasons State title cannot be denied here.

The United States asserts the Sundry Appropriations Act of Oct. 2, 1888, as authority for the purported USGS withdrawal of the lakebed. But the Act does not refer to Utah Lake or any sovereign land and applies only to public lands. That is clear from the Act's plain words and its legislative history.

By holding that the withdrawal was authorized to defeat State title, the Tenth Circuit created several important problems. First, it reversed the "strong presumption" of State title, which can be overcome only if Congress "definitely declared or otherwise made [very] plain," "in clear and especial words," its intention to convey the sovereign land for a public exigency. *Montana,* 450 U.S. at 552. But the Act contains no plain and affirmative language about either sovereign lands or a conveyance. In fact, the court denied State title *because* the Act does not refer to sovereign lands (Pet. App. 15a). That totally inverts the standard and presumption, and such a construction should not defeat the State's Constitutional entitlement.

At the same time, the lower court effaced the Constitutional distinction between public lands and sovereign lands. The court construed the Act's references to public lands as giving USGS authority also over sovereign lands, and thereby effectively equated the two classes of land. If that demotion of sovereign lands were to stand, it

could radically affect State sovereignty, federal-state relationships, and land ownership, classification and administration.

The lower court also failed to require proof that the sovereign land was needed to meet a "public exigency." *Montana,* 450 U.S. at 552, 556. Instead, it found State title was defeated because the 1888 Act facilitated irrigation, which it concluded was "a public purpose motivated by a public exigency."

The court not only changed this standard (again against the State's interest), but also reached a conclusion that would be illogical under any standard. For, irrigation had nothing to do with the lakebed, nor a fortiori with ownership of the lakebed. Settlers had been around and near the Lake for decades by the time the 1888 Act was passed, and they irrigated without regard to the lakebed or its ownership.

The court also failed to respect the fact the United States was required to hold the lakebed in trust for the future State. As trustee, the United States had special duties toward its beneficiary, the State of Utah. If not reversed, the decision below will have effectively eviscerated what has always been a Constitutional trust obligation.

The Equal Footing Doctrine assures Utah's title in Utah Lake. Utah's title here is as strong as any this Court has ever upheld. All of this Court's Equal Footing decisions accord with Utah's situation, and there is no basis nor justification for creating a new exception to defeat Utah's title.

ARGUMENT

I. THE EQUAL FOOTING DOCTRINE GIVES UTAH OWNERSHIP OF THE BED OF UTAH LAKE AS A MATTER OF CONSTITUTIONAL RIGHT.

A. THE CONSTITUTIONAL STANDARD

1. *Basis and Nature of the Equal Footing Doctrine*

The States' equal and "inherent" sovereignty, *Shively v. Bowlby*, 152 U.S. 1, 43 (1894), underlies the Constitution and its Equal Footing Doctrine. Utah was "admitted into the Union on an equal footing with the original States." Act of July 16, 1894, 28 Stat. 107 (Utah Enabling Act). On its statehood date (January 4, 1896), Utah became a sovereign just like each original State, which had become independently sovereign as of the American Revolution. *Martin v. Waddell*, 16 Pet. (41 U.S.) 367, 410 (1842); *Pollard's Lessee v. Hagan*, 3 How. (44 U.S.) 212 (1845).

The original States succeeded to England's rights, title, dominion and sovereignty in America, which included ownership of all navigable waters and the land under them (sovereign lands). *Martin v. Waddell*, 16 Pet. at 410. All incidents of sovereignty passed immediately and automatically: "[T]he prerogatives and regalities which before belonged either to the crown or the parliament, became immediately and rightfully vested in [each] state." *Id.* at 416. Each State took title to all beds of navigable waters within its jurisdiction, and that

title vested as a matter of sovereignty. *Id.* at 410; *Hardin v. Jordan*, 140 U.S. 371, 381 (1891).

When the original States confederated, forming a government of the United States and placing the Constitution at its head, each State remained a full and independent sovereign. The States reserved all rights and powers except those they chose to surrender to the federal government under the Constitution. They kept ownership of their navigable waters and sovereign lands. While they granted the federal government power to regulate the waters as an incident of commerce (U.S. Constitution, art. I, §8) and admiralty (art. III, §2), that did not reduce each State's title in sovereign lands. *Martin v. Waddell*, 16 Pet. at 410.

Other States were created and admitted to the Union on an equal basis with the original States. *Pollard's Lessee v. Hagan*, 3 How. (44 U.S.) 212 (1845), established the non-original States' title in their sovereign lands. One party claimed title from the State (Alabama) and the other under a United States patent. The question was whether Alabama's rights and title would prevail even though it was not an original State and its territory before statehood had been owned by the United States. *Id.* at 220, 228.

The United States' patentee argued that certain language in the enabling legislation (a "compact" between the two sovereigns) gave the United States ownership of both sovereign lands and public-domain lands. *Id.* at 221. The Court disagreed, holding that "Alabama has been admitted into the union on an equal footing with

the original states, the constitution, laws, and compact, to the contrary notwithstanding." "[T]o Alabama belong the navigable waters, and soils under them, * * * subject to the rights surrendered by the Constitution to the United States; and no compact that might be made between her and the United States could diminish or enlarge these rights." *Id.* at 229.

Thus was the Equal Footing Doctrine established; and today, over 140 years later, it remains a vital part of Constitutional law. *Montana v. United States*, 450 U.S. 544 (1981). The Union "was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself." *Coyle v. Smith*, 221 U.S. 559, 567 (1911).

"[T]he constitutional equality of the states is essential to the harmonious operation of the scheme upon which the Republic was organized. When that equality disappears we may remain a free people, but the Union will not be the Union of the Constitution." *Id.* at 580.

2. *The Equal Footing Doctrine Imposes a "Strong Presumption" in Favor of State Title and Imposes Trust Responsibilities on the United States.*

Equal Footing rights spring from the States' "inherent sovereignty," *Shively v. Bowlby*, 152 U.S. 1, 43 (1894), and from their reservation of those rights. States have title to their sovereign lands under "the Constitution itself," so title does not depend on Con-

gress's graces. *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977).

Because it is a Constitutional right, State title is *presumed*. Indeed, "A court deciding a question of title to the bed of a navigable water must, therefore, begin with a *strong presumption*" in favor of State title. *Montana, supra*, 450 U.S. at 552 (emphasis added). The presumption can be overcome only upon proof that the narrow exception to the Equal Footing Doctrine applies. The exception consists of strict tests that, in this Court's holdings, have been satisfied only once. (We discuss the exception below.)

As another result of the States' Constitutional equality, and "as an incident of sovereignty," *Montana v. United States*, 450 U.S. at 551, citing *Martin v. Waddell*, 16 Pet. at 409-11, the United States is required to hold sovereign lands in trust for the future State that will own them. The trust has been part of the Equal Footing Doctrine from the first. *Pollard's Lessee*, 3 How. at 222; *Knight v. United Land Assoc.*, 142 U.S. 161, 183 (1891); *Borax, Ltd. v. Los Angeles*, 296 U.S. 10, 15 (1935).

As in any trust relationship, the United States, as trustee, is very restricted in what it may do with the trust property. The United States must hold sovereign lands for the beneficiary's benefit, and must act faithfully as a fiduciary. But the United States' trust obligations regarding sovereign lands only begin with the general trust principles all trustees must obey; for the Constitution it-

self imposes additional protections, restrictions, and a presumption in favor of State title. This is no regular trust, for to violate it is to violate the Constitution itself.

3. *There is Only a Very Narrow Exception to the Equal Footing Doctrine.*

Montana v. United States is this Court's most recent Equal Footing decision. It strongly reaffirms the Doctrine as it was established in *Martin v. Waddell* and *Pollard's Lessee v. Hagan* and their progeny. It explains that "The State's power over the beds of navigable waters remains subject to only one limitation: the paramount power of the United States to ensure that such waters remain free to interstate and foreign commerce." *Montana*, 450 U.S. at 551. It also acknowledges that "It is now established, however, that *Congress* may sometimes *convey* lands below the high-water mark of a navigable water, and so defeat the title of a new State." *Id.* (emphasis added; brackets and indication of internal quotation omitted).

Thus, there is an exception to the general rule of State title. However, (as is seen from the quote immediately above) the exception applies only to sovereign lands Congress has conveyed. The exception does not apply otherwise. Even then it is a narrow exception: Congress must have conveyed the sovereign land "because of 'some international duty or public exigency.' " *Id.* at 552, quoting *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926). And such a conveyance must not be lightly inferred; Congress's intention to convey the sovereign land must be "definitely declared or otherwise made [very]

plain," "in clear and especial words," or the valid muniment of title must "in terms embrace[ ] the land under the waters * * *." *Id.*, quoting *Holt State Bank, supra*, at 55; *Martin v. Waddell*, 16 Pet. at 411; and *Packer v. Bird*, 137 U.S. 661, 672 (1891). Moreover, the proof must overcome the "strong presumption against conveyance by the United States." *Id.*

The exception is narrow and sets a heavy burden on the State's opponent. And that is proper, for it should be no easy thing to defeat a State's Constitutional entitlement. Indeed, that burden has been met only once, in a case this Court has described as "a singular exception" "based on very peculiar circumstances." *Montana*, 450 U.S. at 555 n. 5, referring to *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970).

In sum, the State's title can be defeated only if the strong presumption in favor of State title is overcome by proving that: *Congress* has *conveyed* the *sovereign land* to meet some *international duty or public exigency*, and Congress's intention to convey that land was *clearly and definitely expressed*.

The United States claims USGS withdrew the bed of Utah Lake with authority under the Sundry Appropriations Act of 1888, 25 Stat. 505, 526-27. It is clear on its face, however, that the Act does nothing to disrupt the State's title.

The Act speaks for itself (or perhaps more aptly, it is dispositively silent), and it does not meet any part of the Constitutional test. The Act authorizes no convey-

ance; does not refer to sovereign lands generally nor to Utah Lake specifically; does not clearly and definitely express any intention to defeat the State's title; and the lakebed had nothing to do with any public exigency.[5]

B. THE WITHDRAWAL OF UTAH LAKE DOES NOT SATISFY THE CONSTITUTIONAL STANDARD.

1. *A State's Equal Footing Title can be Defeated Only by a Congressional Title Conveyance.*

The United States wants to change the venerable Equal Footing Doctrine by adding a new exception that would enable the Utah Lake withdrawal to defeat Utah's title. But the United States' position cannot be justified. Such a new exception would violate basic Constitutional principles underlying the Doctrine.

The Doctrine strictly protects State title except upon proof, under the Constitutional standard, that before statehood the United States conveyed title to a third party,[6] leaving nothing for the State to succeed to. A withdrawal or reservation does not constitute a convey-

[5] Because the Act and the administrative withdrawal undeniably were not tied to an international duty, hereinafter we discuss this branch of the Constitutional test by referring only to "public exigency."

[6] By this we mean to include also any other situation where the United States had no title to which the State could succeed. **E.g.,** Knight v. United Land Ass'n., 142 U.S. 161 (1891) (title under Mexican grants pre-dating territorial acquisition by the United States remains secure as against the state and federal governments). Aside from the **Knight** situation, this Court has found against State title only where there was a pre-statehood title conveyance. Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970) (The United States **conveyed fee title** to the tribe.)

ance or grant, *United States v. Utah*, 283 U.S. 64, 88 (1931), and the United States correctly does not suggest it conveyed title here. Instead, it bases its case solely on the fact of the reservation or withdrawal itself. But under the Constitution, a withdrawal or reservation in itself lacks the power to defeat State title.

Montana illustrates the principle. It involved a federal reservation, but that fact did not help the United States. The dispositive question, along with whether there was a public exigency, was "whether the United States [had] *conveyed*" the sovereign land to the Indian tribe by the two treaties that defined the reservation. 450 U.S. at 550-51 (emphasis added). The Court examined those treaties under the tests composing the Constitutional standard and, finding no conveyance, held for the State. Montana prevailed despite the reservation.

Similarly, in *Choctaw, supra,* where there also was a reservation, it was undisputed that if title were in the United States on Oklahoma's statehood date, it passed "as an incident of statehood." 397 U.S. at 627-28. Besides the public exigency, the only question was whether the pre-statehood treaty had "conveyed title" to the Indians, *id.* at 628; the fact of a reservation itself determined nothing.[7]

[7] The Choctaw Indians prevailed only because of "very peculiar circumstances not present in **[Montana,]**" 450 U.S. at 555 n. 5 (and if not present in **Montana**, then certainly not in the instant case). The **Choctaw** treaty, which followed earlier United States treaty betrayals, "promised to convey new lands • • • in fee simple, and also • • • 'that no part of the land granted to them shall ever be embraced in any Territory or State.' " **Id.,** quoting **Choctaw,** 397 U.S. at 625.

As **Montana** noted, "Neither the special historical origins of the

Montana and *Choctaw*, of course, are not the only cases in which the United States' claim involved an actual or purported withdrawal or reservation. *See e.g., Holt State Bank* and *Pollard's Lessee, supra.* Indeed, so far as we know, every Equal Footing case[8] this Court has decided has involved either an arguable federal title conveyance or some sort of reservation, or both. Yet, in none of those cases could the United States prevail on the mere basis of its reservation. The Court has always looked beyond the reservation to address the Constitutional requirement of a title conveyance. And the United States cannot meaningfully distinguish its situation here so as to avoid that precedent.[9] Unless Constitutional law is dramatically changed in this case, Utah must prevail.

The Doctrine's established exception is justified where the United States' new exception is not. Obviously the Equal Footing Doctrine cannot operate to give a State its entitlement where the sovereign land was validly con-

[7] **Continued**
Choctaw * * * treaties nor the crucial provisions granting Indian lands in fee simple and promising freedom from State jurisdiction in those treaties have any counterparts in the terms and circumstances of the [**Montana**]" treaties. 450 U.S. at 555 n. 5. That is a fortiori true of the 1888 Act in the instant case.

[8] That is, every Equal Footing case in which a State's title in sovereign lands was at issue. We do not say, however, that in all those cases the United States so squarely based its claim on the mere fact of a reservation as it does here.

[9] In fact, besides the fact that no conveyance is alleged, the only distinction we see is that here the United States did not purport to reserve or withdraw the bed of Utah Lake for use by any third party, but merely for itself. (In contrast, in some prior cases, **e.g., Montana, Holt State Bank**, and **Choctaw, supra**, the reservation had the purpose of benefiting some third party.) But that distinction only weakens the United States' already-untenable case.

veyed before statehood to a third party. Of course, under the Constitutional standard, the conveyance's validity depends in part on whether it was for a public exigency; but assuming the Constitutional requisites are met, and the United States really does not have title, then there is no title for the State to succeed to. That narrow situation is what the exception covers. *Montana,* 450 U.S. at 551-52.

But the instant case is far different. Here there are no third party rights and the withdrawal did not dispossess the United States of title. A federal reservation or withdrawal "means no more than that the land is shifted from one federal use, and perhaps from one federal managing agency, to another." *United States v. California,* 436 U.S. 32, 40 (1978) (footnote omitted).

Almost by definition a withdrawal or reservation cannot override the Constitutional transfer of title to the State at statehood. It neither extinguishes the United States' title nor abrogates the trust in which the land is held for the future State. "A [federal] reservation * * * cannot operate to escalate the underlying claim of the United States to the land in question."[10] *Id.* at 41.

Of the many cases in which title conveyances were asserted, only one was able to meet the burdens to defeat

[10] In **California**, the Court upheld the State's title to the submerged lands within the Channel Islands National Monument, situated within the three-mile marginal sea. The sentence quoted in the text referred to a national monument reservation, which was held to be no basis for federal title under the Submerged Lands Act, 43 U.S.C. 1313(a). It involved a post-statehood reservation of lands that before the Submerged Lands Act were clearly federal. 436 U.S. at 33-34 and n. 3.

State title. *Choctaw, supra.* And if those other conveyance-related cases were not strong enough, the United States' present case certainly is not strong enough to defeat Utah's title. In light of precedent and Constitutional principles, the withdrawal of Utah Lake looks weak indeed.

If the United States prevails here, it can only be upon a new exception that offends basic Equal Footing principles. It would violate the States' "inherent sovereignty" and nullify the United States' trust obligations; it would permit the trustee to defeat its beneficiary's sovereign title, and take title for itself, by simply reclassifying the lands held in trust; it would reward the trustee for its trust violation; and it would sustain the United States' arrogation of vital rights long held to belong to the States. In short, it would make Utah less equal and less sovereign than other States. The United States seeks to defeat Utah's title in a way the Constitution never envisioned; and, if allowed, it would open the door to further erosion of the Doctrine and less trust responsibility.

But even if Constitutional principles had room for a new exception for withdrawals, *this* withdrawal does not defeat Utah's title. For, assuming a withdrawal could even begin to challenge sovereign title, it would still have to cross every Equal Footing barrier to prevail: The proponent would have to prove the withdrawal was Congressionally authorized, valid, and intended to (and capable of) redressing a public exigency. And Congress's intentions must have focused on the affected sovereign

land, and must have been expressed in clear and definite terms. And the evidence of all of that would have to overcome the strong presumption in favor of State title. If all those barriers were not crossed, the withdrawal could not disturb State title.

The 1889 withdrawal could not meet those heavy burdens. USGS withdrew Utah Lake by purported authority of the 1888 Act. But (as we discuss hereafter) the Act said nothing of Utah Lake—nor of any sovereign land—and withdrawing the Lake could have satisfied no public exigency. Withdrawals are not competent to override sovereign title, and the 1889 withdrawal could not qualify to defeat Utah's title in any event.

2. *The 1888 Act Authorized No Action on Sovereign Lands.*

a. The Act's Terms Show It Applied Only to Public Lands, Not Sovereign Lands.

In *Montana,* the "strong presumption" in favor of State title was shown to relate significantly to the clarity and definiteness test. A court must not infer a conveyance of sovereign lands; Congress's intention to convey must be definitely declared or otherwise made very plain, or stated in clear and especial words. 450 U.S. at 552, 554. The strong presumption cannot be overcome without such an expression.

Nothing in the 1888 Act or other legislation even suggests, much less expresses in clear and definite terms, that Utah Lake or other sovereign lands were to be with-

held from a future State. "There was nothing in this [Act] which even approac[h]es a grant of rights in lands underlying navigable waters; or anything evincing a purpose to depart from the established policy * * * of treating such lands as held for the benefit of the future state." *United States v. Holt State Bank*, 270 U.S. 49, 58-59 (1926).

It would have been "easy [for Congress] to have expressed that intention" to defeat the State's title. *Mann v. Tacoma Land Company*, 153 U.S. 273, 285 (1894). But "[h]aving failed to do so, and omitted any reference to [sovereign] lands," State title cannot be defeated. *Id.* at 285-86. "[N]o unexpressed and unsuggested intention should be attributed to Congress—certainly no intention to make the people of the State * * *, who otherwise would receive these [sovereign] lands for their general benefit, suffer * * *." *Id.* at 286.

Congress, no doubt, was capable of expressing any intention to defeat the future State's title. It did so once before. *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970). But, instead, the 1888 Act was silent about sovereign lands. One need not seek an exotic explanation for it; the Act did not refer to sovereign lands because Congress did not intend to. There was no reason to change the status of beds of navigable waters.

However, the Tenth Circuit upheld the withdrawal of Utah Lake *because* of the Act's silence (Pet. App. 15a). That is, because the Act did not expressly and affirmatively *exclude* sovereign lands from its scope, the lower court held the State could not own the lakebed.

Id.[11] That construction diametrically opposes the "strong presumption" for State title, which can be overcome only by clear, definite and especial words conveying sovereign lands. Silence does not overcome the presumption.

Under the Tenth Circuit's curious reasoning, a subject not mentioned in the Act was inferred to be within the Act's scope because it was not mentioned. The lower court focused on what was not stated (*i.e.*, expressly excluded), and in effect transformed legislative silence into an affirmative declaration against sovereign lands. But that construction cannot withstand the strong presumption,[12] and should not defeat State title.

The lower court not only misconstrued the Act's silence regarding sovereign lands, but also misapprehended the plain words that are in the Act. And it removed the important distinction between public lands and sovereign lands; a distinction that has been recognized and maintained from the first. *Pollard's Lessee v. Hagan*, 3 How. 212, 221, 223-25 (1845).

Public lands compose the public domain, are owned by the United States and are subject to the public-land laws. "Public lands" are those "subject to sale or other disposal under general laws." *Barker v. Harvey*, 181 U.S.

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[11] The lower court concluded that the Act's silence on sovereign lands meant that "[t]he statute thus imposes no restriction on the U.S.G.S.'s selection authority on the type of lands that could be designated or selected." (Pet. App. 15a.)

[12] Indeed, if the United States' position does anything at all regarding the 1888 Act, it might at most suggest a statutory ambiguity. We dispute that there is any ambiguity at all, but if there were, the strong presumption would require that it be resolved in the State's favor.

481, 490 (1901), quoting *Newhall v. Sanger*, 92 U.S. 761, 763 (1875). "Specifically, the term 'public lands' [does] not include tidelands [*i.e.*, sovereign lands]." *Borax, Ltd. v. Los Angeles*, 296 U.S. 10, 17 (1935), citing *Mann v. Tacoma Land Co.*, 153 U.S. 273, 284 (1894).

On the other hand, sovereign lands are beds of navigable waters. They are owned by the States as a matter of inherent sovereignty and the Equal Footing Doctrine. A State's title in sovereign (submerged) lands "is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to pre-emption and sale." *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 452 (1892).

The land laws open the public domain to public access for various purposes: the United States may sell its public land outright, or may open it to entry, settlement, occupation, homesteading, or leasing, etc., under various statutory conditions.

On its face the 1888 Act demonstrates that it relates only to the public domain.[13] Its operative terms are strictly public-land-law terms: "all the lands which may hereafter be designated or selected * * * for the sites for reservoirs, ditches or canals for irrigation purposes and all the lands made susceptible of irrigation * * * are * * * reserved from *sale as the property of the United*

[13] This Court has already acknowledged that the 1888 Act was addressing homesteaders and other settlers on public lands. California v. United States, 438 U.S. 645, 659 (1978).

States, and shall not be subject * * * to *entry, settlement* or *occupation*." The proviso adds that the President might, however, open the lands to *settlement* under the *homestead* laws. 25 Stat. at 527 (emphasis added).

The Act could have been referring only to public lands, not sovereign lands. It was legally and physically impossible to sell, enter, settle, occupy or homestead the water-covered bed of Utah Lake or other sovereign lands. Those things could be done only on public lands.

b. The Act Addressed a Problem Only on the Public Domain.

Moreover, the problem the Act was redressing involved only public lands. "The opening of the arid lands to homesteading raised the specter that settlers might claim lands more suitable for reservoir sites or other irrigation works, impeding future reclamation efforts. Congress addressed this problem in the [1888] Act * * *." *California v. United States*, 438 U.S. 645, 659 (1978).

Congress's concern was not academic. Fraudulent land-grabbers, as well as legitimate settlers and entrymen, had been taking control of key public lands under various land laws.[14]

[14] While the land laws had been passed to facilitate settlement of public lands, they were being abused by speculators. Relevant acts include the General Preemption Act of 1841, the Homestead Act of 1862, the Timber Culture Act of 1873, the Timber and Stone Act of 1878, the Timber Cutting Act, and the Desert Land Act of 1877. They "were commonly used by larger economic interest always glad to appeal to pro-homesteader sentiments to gain their ends." P. Gates, History of Public Land Law Development 638 (1968).

Many of the thousands of public land filings were by speculators and stockmen who had no intention to irrigate the land. Some simply took advantage of the opportunity to graze the lands for three years at 25-cents an acre under the Desert Land Act; others "frequently used dummy entrymen to file for them so they could assemble title to large ranches where only the hay meadows were irrigated and no lands were cultivated." L. Mall, *Public Land and Mining Law* 70 (3rd ed. 1981); and P. Gates, *History of Public Land Law Development* 640 (1968) (hereafter "Gates"). These were "speculative purposes in violation of the restrictions of the law." Gates at 639.

"Thousands of doubtful entries went to patent each year, many of which later were proved to be fraudulent." *Id.* at 641. By 1883, the Commissioner of the Land Office "had had enough of [the] frauds," and advocated the repeal of the timber acts and the Desert Land Act, under which most of the frauds were occurring. *Id.* at 640. His successor and others agreed. *Id.*

Although it did not repeal those laws, "Congress became convinced that the Desert Land Act [and other land laws] needed tightening up, or even suspension, pending further consideration of the best way to aid in reclaiming the arid lands of the West without letting them fall into the hands of 'monopolistic speculators.'" *Id.* at 641. So, Congress passed the 1888 Act, which suspended operation of the land laws as to lands selected as sites for reservoirs and other irrigation works. *Id.*

The 1888 Act arose from a problem on public lands

and pertained only to public lands. See *California v. United States*, 438 U.S. 645, 659 (1978), and Gates at 641. The Act had no purpose as to sovereign lands. That is shown in the Act's legislative history, which makes no reference to sovereign lands but is replete with discussions of public lands and the land laws.[15]

For example, the Appropriations Committee at first would not approve the appropriation for the USGS surveys because the bill then did not prevent people from "following up this geological survey day by day and when a location is found suitable for a reservoir under the general land laws immediately picking it up as a homestead, or under the timber-culture law, or the pre-emption law." 19 Cong. Rec. 7016 (1888). The bill did not preclude "an enterprising American citizen [from] locat[ing] himself * * * in the pathway of [a canal site located by

[15] The following disjunctive examples are but a few of many statements showing that Congress was about to legislate concerning public lands (which could be taken by private entrymen under the land laws) as opposed to sovereign lands (which are not subject to such entry): "I tell you, this is an anti-monopoly measure. This is a measure to preserve this land for the people. This is a measure to prevent the headwaters of these streams from being monopolized by a few * * *." 19 Cong. Rec. 7023 (1888). "[B]ut land which can be covered by water and can be reclaimed * * * should be disposed of with great care, and the legislation should be such as to enable settlers to reclaim it, and also to prevent monopoly." Id. at 7015. "We must know before we legislate further how to dispose of these lands." Id. "[I]f you * * * wait until a plan has been devised by which to dispose of these lands, * * * you will continue to wait, and the places for reservoirs will be picked up, your ditch lines will be obstructed, private rights will have intervened, the land will be taken up by cattlemen and others, * * * until [it finally becomes necessary to] buy[ ] out the places for reservoirs by [condemnation]." Id. "The places for the reservoirs are being taken by private parties, and a person who locates where there ought to be a reservoir knows it very well." Id. at 7016. See also Id. at 7013, 7018, 7019, 7021-7024 and 7026-7031.

the geological survey] so that the * * * United States would be bound sooner or later to pay him a large sum of money for the use of the land which he, under the general land laws, is entitled to take." *Id.*

"The chairman * * * [thought] that when a survey shall be made under this appropriation[,] speculators and schemers will follow along the survey and locate homesteads or otherwise take up tracts * * * which would be selected as places for reservoirs." Senator Jones continued, "I [do not object] to having a clause added that all this land shall be reserved and shall not be subject to be taken up by private individuals until after * * * the location of these works has been fixed by the engineers of the Government." *Id.* at 7018.

So, the concern was that such reservoir sites "upon the public domain" "will fall into the hands of private men," who would monopolize "the use of water and prevent[ ]" settlement. *Id.* at 7019.

That concern yielded amendments to the bill that now appear in the Act as the proviso and the sentence immediately preceding it. Passed with those amendments, the 1888 Act authorized USGS to do two things: survey the arid public lands for suitable irrigation-related sites, and select or withdraw those sites.

The Act suspended operation of the land laws on the withdrawn lands so as to stop the land-grabbers. Otherwise, USGS surveyors would locate suitable sites only to have land-grabbers follow behind and immediately use the land laws to gain ownership or control of those sites.

Beds of navigable lakes did not need the Act's protection because they were never subject to the monopolists or the land laws. *Borax, Ltd., supra,* 296 U.S. at 17. The Act had nothing to do with sovereign lands, and did not authorize the withdrawal of Utah Lake.

Besides exceeding its authority on Utah Lake, USGS also abused what legitimate authority it had under the Act by withdrawing too much public land. Seeing almost everything as a worthy reservoir, ditch, or irrigation site, it withdrew practically "all of the public lands in the West from settlement." *California v. United States,* 438 U.S. 645, 659 (1978). The public outcry was that now USGS, rather than private monopolists, was thwarting settlement. *E.g.,* 21 Cong. Rec. 9155 (1890). As a result, in 1890 Congress repealed the 1888 Act. The 1890 Act and later legislation (see Pet. App. 42a-43a) confirmed that the 1888 Act had authorized the withdrawal of only "public lands."[16]

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[16] The 1890 legislation, 26 Stat. at 391, provided that "so much of [the 1888 Act] as provides for the withdrawal of the public lands from entry, occupation and settlement, is hereby repealed * * *."

Further legislation, in 1891, 26 Stat. 1101, supports the 1888 Act's unmistakable pertinence only to public lands. The 1890 act had provided that "reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement as provided for by said [1888] act * * *." Id. at 391. The 1891 act corrected another aspect of USGS's earlier excesses by providing that the reservoir sites were restricted to "only so much land as is actually necessary for the construction and maintenance of reservoirs * * *." Each of the 1890 and 1891 acts was tied explicitly to the terms of the 1888 Act, and did not purport to expand any authority under that Act. 1897 legislation relating to the use of reservoir sites, 29 Stat. 599, referred to the 1891 act. None of the acts professed, in clear and definite terms or otherwise, to authorize or support the withdrawal of sovereign lands.

The 1888 Act was general legislation about public lands, and "[i]t is settled that the general legislation of Congress in respect to public lands does not extend to [sovereign] lands."[17] *Mann v. Tacoma Land Co.*, 153 U.S. 273, 284 (1894). If Congress had wanted to include sovereign lands within the Act's scope, it would have expressed itself in those terms. Congress in fact authorized USGS to do nothing to the bed of Utah Lake.

The Tenth Circuit's contrary conclusion threatens long-standing, basic principles. The decision below treats sovereign lands as though they have the same status as public lands. But that cannot be done without demoting sovereign lands, and such a demotion is wholly unjustifiable.

Assuming Congress could destroy the distinction sovereign lands enjoy over public lands (assuming the Constitution would permit it), Congress certainly did not do it by the language (rather, silence) of the 1888 Act. Only an inverted analysis would conclude that the Act intended to remove the distinction between these two classes of land. If the decision below is not reversed, the legal and practical ramifications in State sovereignty and land administration (not to mention confusion and potential litigation) could be disastrous: Sovereign lands, like public lands, would then be open to public exploitation; the States would lose a significant right of sovereignty; and the Equal Footing Doctrine would be little more than history. The Tenth Circuit should be reversed.

[17] The word in the quotation that we have replaced with "sovereign" was "tide." That substitution does not change the meaning, for tide lands are a type of sovereign land.

C. THERE WAS NO PUBLIC EXIGENCY INVOLVING THE BED OF UTAH LAKE.

The "public exigency" test, like the other components of the Constitutional standard, was not satisfied below. Indeed, the lower courts used a different test.

The district court made no analysis under the public exigency test. The Tenth Circuit acknowledged that fact, but nevertheless was "satisfied that the withdrawal of Utah Lake, including its bed, was made for *a public purpose motivated by a public exigency*, given Congress' stated concerns that arid lands of the western states be orderly and fairly irrigated, reclaimed, and settled." (Pet. App. 23a (emphasis added), citing the 1888 Act.)

That is not the correct standard. And the State suffered as a result of the lower court's faulty analysis. Suddenly the State's title was being defeated for something less than a public exigency.

The lower court based its new approach on an excerpt from *Shively v. Bowlby*:

> We cannot doubt, therefore, that Congress has the power to make grants of lands below high water mark of navigable waters in any Territory of the United States, whenever it becomes necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, *or to carry out other public purposes appropriate to the objects for which the United States hold the Territory*.

> But Congress has never undertaken by general laws to dispose of such lands. And the reasons are not far to seek. [152 U.S. 1, 48 (1894) (emphasis added).]

Most of that language was quoted in *Montana*, 450 U.S. at 551. But unlike the Tenth Circuit, this Court did not give overriding significance to the italicized phrase. In fact, in *Montana* the first word following the *Shively* quotation is "But." 450 U.S. at 552. That suggests that whatever "public purposes appropriate to the objects for which the United States hold the Territory" means, it must yield to the higher standard that was then stated: "But because control over the property underlying navigable waters is so strongly identified with the sovereign power of government, it will not be held that the United States has conveyed such land except because of 'some international duty or public exigency.' " *Id.*, citing *United States v. Oregon*, 295 U.S. 1, 14 (1935), and *United States v. Holt State Bank*, 270 U.S. at 55. A "public exigency" is undeniably essential. *Montana*, 450 U.S. at 552 and 556.

That was reemphasized when *Montana* explained that "even though the establishment of an Indian reservation can be an 'appropriate public purpose' within the meaning of *Shively v. Bowlby*, justifying a congressional conveyance of a riverbed, the situation of the Crow Indians at the time of the treaties presented no 'public exigency' "; so the State prevailed. 450 U.S. at 556 (citations omitted).

That is proper. Given the gravity of the State interest at stake, title should not be denied except for a real and relevant public exigency.

The lower court's mistake, however, was not only that it failed to apply the public exigency standard. Its analysis was wrong under any standard. The court found its "appropriate public purpose" in the Act's facilitation of irrigation. But irrigation had nothing to do with the lakebed nor with its ownership.

Regardless of who owned the lakebed, it was covered by water, and settlers had long used that water. By the time the 1888 Act was passed, they had been successfully irrigating from the Lake for decades.[18] Irrigation was fair and orderly, and was governed by western water law. There simply was no relevant public exigency to cure, and a federal withdrawal of the lakebed could not have cured anything, anyway.

The land-grabbing that was then occurring on public lands under the land laws also did not present any relevant problem or exigency. For the bed of Utah Lake was not in jeopardy. It physically could not be settled because of the water, and it legally could not be taken into private control because it was sovereign land. So, it was safe from, and independent of, any alleged problem.

"Exigency" denotes an urgent need, and the United States did not need the lakebed (and a fortiori did not

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[18] The Mormons settled the area around Utah Lake in April 1849. "Inventory of the County Archives of Utah, No. 25," Utah County (Provo), Utah Historical Records Survey, p. 11 (Sept. 1940); and irrigation from the Lake has a long history. "Report of Irr. Inv. in Utah," U.S.D.A. Bull. 124, pp. 63-66 (1903).

need title to it) at all. There was no irrigation or settlement problem involving Utah Lake, and certainly no problem that could be solved by withdrawing the lakebed. Since there was no relevant public exigency, Utah owns the bed under the Equal Footing Doctrine.

II. UTAH'S EQUAL FOOTING TITLE IS AS STRONG AS ANY THIS COURT HAS EVER UPHELD.

From *Pollard's Lessee* to the present, the Equal Footing Doctrine has reflected and respected the States' Constitutional ownership of their sovereign lands. This Court has applied the Doctrine in several cases, but only *Choctaw, supra,* met the stringent Constitutional tests to defeat a State's title. We submit that Utah's title in Utah Lake is as good as any this Court has ever had occasion to uphold under the Doctrine. We give a few comparisons.

In the most recent case, *Montana,* the question was whether State title was defeated by two Indian treaties. The first treaty "did not by its terms formally convey any land to the Indians at all." 450 U.S. at 553. So the Court dismissed it and turned to the second treaty. Utah should prevail on that basis alone. For the 1888 Act likewise did not purport to convey any lands, and does not defeat Utah's title.

The second treaty "did expressly convey land to the Crow Tribe." *Id.* It "described the reservation land in detail and stated that such land would be 'set apart for

the absolute and undisturbed use and occupation of the Indians herein named * * *.'" *Id.* (footnote omitted). It provided that the United States "solemnly agrees" that no one but designated government agents "shall ever be permitted to pass over, settle upon, or reside in" the reservation. *Id.* at 553-54. Nevertheless, the treaty was "not strong enough to overcome the presumption against the sovereign's conveyance of the riverbed." *Id.* at 554.

The Court explained: "The treaty in no way expressly referred to the riverbed, nor was an intention to convey the riverbed expressed in 'clear and especial words,' or 'definitely declared or otherwise made very plain.'" *Id.* (citations omitted to *Packer v. Bird, Martin v. Waddell,* and *United States v. Holt State Bank*). "The mere fact that the bed of a navigable water lies within the boundaries described in the treaty does not make the riverbed part of the conveyed land, especially when there is no express reference to the riverbed that might overcome the presumption against its conveyance." *Id.*

If Montana's title could not be defeated under the second treaty, Utah's title certainly should not be denied under the 1888 Act (nor anything derived from it, *e.g.,* the withdrawal). The treaty conveyed specific land. In contrast, the 1888 Act made no conveyance and contemplated no particular public land out of "the arid region of the United States." In fact, the Act left it to USGS to decide which public lands to withdraw, which further shows that the Act was not intended to encroach on sovereign lands; for it is not reasonable that Congress would think to defeat a State's Constitutional entitlement

by leaving the final decision to administrative action.[19]

The Court in *Montana* further found the riverbed was not needed by the Indians as part of the occupancy of the land being reserved for their use and thus found there to be no public exigency involved. The same is true for Utah Lake—the bed was not necessary to accomplish the purpose of the 1888 Act.

Montana prevailed also despite "the unique legal status of Indian tribes under federal law" that gives Congress a "unique obligation toward the Indians," which often has been the basis for valid legislation giving Indians "special treatment," *Morton v. Mancari*, 417 U.S. 535, 551, 555 (1974); and despite this Court's practice of resolving doubts in Indian treaties in favor of the Indians. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970). That shows the strength of the presumption in favor of State title.

In this case nothing exists to even challenge that presumption. Here the United States has no special responsibility, like the Indian trust-relationship, that could be claimed to override its Constitutional obligation to hold the lakebed in trust for Utah.

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[19] The tenuity of the decision below is reflected further in its reliance on "documents compris[ing] [USGS's] contemporaneous interpretation and understanding of the scope" of the agency's own action. The court concluded therefrom that USGS actually intended to withdraw the bed of Utah Lake. (Pet. App. 13a). We need not debate USGS's intentions, for they are irrelevant if the agency had no authority. Congress's intent in the 1888 Act is at issue here. The cases the lower court cites, **id.**, (**Choctaw Nation** and **Udall**) do not require deference to an agency's understanding of its own actions where those actions are taken without statutory authority. Since the treaties were insufficient to overcome State title in **Montana**, clearly the administrative documents in this case cannot suffice.

Holt State Bank, supra, also involved an Indian reservation that enveloped a navigable lake whose title was in dispute. 270 U.S. at 52, 57-58. The State prevailed because the reservation did not "operate[ ] as a disposal of lands underlying navigable waters within its limits." *Id.* at 58.

The Court emphasized that the treaties had not made "a grant of rights in" the sovereign lands, *id.* at 58, and that only affirmative language, not silence, can defeat State title.[20] The 1888 Act also did not grant any federal rights in the bed of Utah Lake and was silent about sovereign lands.

In *Pollard's Lessee*, the opponents of State title based their claim on a United States patent and an act of Congress "confirming to them the premises in the patent," 3 How. at 219, 220, and on the legislation enabling Alabama Territory to become a State. *Id.* at 220-221, 223. State title prevailed nevertheless.

In Utah's case there was neither a patent purporting to give title to a third party nor a provision in the Enabling Act that even arguably allowed the United States to own the bed of Utah Lake. In fact, if any inference should be drawn from Utah's Enabling Act, it is that Congress wanted to make sure all of Utah's sovereign rights were secure.[21]

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[20] "There was no formal setting apart of what was not ceded, nor any affirmative declaration of the rights of the Indians therein, nor any attempted exclusion of others from the use of navigable waters." **Holt,** 270 U.S. at 58 (footnote omitted).

[21] The Enabling Act of July 16, 1894, first expressly provided that Utah was "to be admitted into the Union on an equal footing with

The United States prevailed against Utah's title only under the Tenth Circuit's reverse presumption that Utah could not own the lakebed because sovereign lands were not expressly excluded from the Act's scope (Pet. App. 15a), which construction opposes all that *Montana* and its antecedents stand for. *Montana* emphasizes the dominance of the strong presumption for State title, which can be overcome only by a clear and definite expression of Congressional intent to convey the sovereign land to meet a public exigency.

Congress did not defeat the State's title in Utah Lake.[22] The 1888 Act was merely a general act intended to address certain problems on the public domain. It had no reference to, and no effect on, sovereign lands. Nor did any relevant public exigency need the lakebed, and that alone is enough to require a decision in favor of State title. *Montana*, 450 U.S. at 556.

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[21] **Continued**
the original States." 28 Stat. 107. Then it provided that "all Acts or parts of Acts in conflict with the provisions of this Act, whether passed by the legislature of [Utah] Territory or by Congress, are hereby repealed." Sec. 20; 28 Stat. 112. Congress never has attempted to defeat Utah's title in sovereign lands; but such an attempt would not have survived the Enabling Act, anyway.

[22] Even assuming the withdrawal had been authorized, it only withdrew the land from public entry and monopolization—not from State ownership at statehood. Assuming the withdrawal were valid at all, at statehood the Equal Footing Doctrine and the Utah Enabling Act superseded it. But even if we indulge the United States' argument further yet, and assume the withdrawal survived Utah's statehood, the withdrawal never purported to do more than reserve a reservoir site. A reservoir site withdrawal is not inconsistent with, and does not defeat, a State's lakebed title and ownership of mineral and other estates.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

DAVID L. WILKINSON
UTAH ATTORNEY GENERAL

DALLIN W. JENSEN
Solicitor General
Counsel Of Record

MICHAEL M. QUEALY
Assistant Attorney General

R. DOUGLAS CREDILLE
Assistant Attorney General

ATTORNEYS FOR PETITIONER
STATE OF UTAH
1636 West North Temple, Suite 300
SALT LAKE CITY UT 84116
(801) 533-4446

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